Supreme Court, U.S.
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86-264

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

against

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. May the union-appointed trustees of a jointly-administered trust fund sue under §§ 502 and 515 of ERISA to collect contributions owed the fund by an employer without first arbitrating, with the employer-appointed trustees of the fund, the issue whether the latter should join such suit?

2. Where a participant in an employee-benefit trust fund has made demand upon the trustees thereof to sue to collect delinquent contributions owed the fund, but the latter have wrongfully failed and refused to do so, may the participant bring suit himself to collect such contributions for the fund and to remedy the trustees' refusal?

Parties to the Proceedings Below

Union-Appointed Trustees of the
Tapers Industry Insurance and Annuity Funds:

John Alfarone
Joseph Giordano
Brian Gordon

Employer-Appointed Trustees of the
Tapers Industry Insurance and Annuity Funds:

Irving Mazzer
Seymour Levine
Michael Petrulli

Other Parties to the Proceedings Below:

Daniel Jones
Bernie Wolff Construction Corp.
Component Assembly, Inc.
Nastasi-White, Inc.
Circle Industries Corp.
Quick-Way Finishers, Inc.

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Petitioners,

against

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, John Alfarone, Joseph Giordano, Brian Gordon and Daniel Jones, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 14, 1986.

Opinions Below

The opinion of the Court of Appeals is reported at 788 F.2d 76. The Court of Appeals' decision denying peti-

tioners' request for rehearing and rehearing *en banc* is unreported. The decisions of the District Court for the Eastern District of New York are unreported. All are reprinted in the appendix hereto. In addition, the decision of the district court in a companion case, *Alfarone, et al. v. Nastasi-White, Inc., et al.*, CV 84-3181, is also reprinted in the appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 14, 1986. A timely petition for rehearing *en banc* was denied on May 22, 1986, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

Section 301(a) of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a):

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction over the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(e)(1):

> (e) **Jurisdiction.** (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary or fiduciary. State courts of competent jurisdiction

and district courts of the United States shall have concurrent jurisdiction over actions under subsection (a)(1)(B) of his section.

Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2):

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,
(B) interest on the unpaid contributions
(C) an amount equal to the greater of—
(i) interest on the unpaid contributions, or
(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code.

Section 515 of ERISA, 20 U.S.C. § 1145:

Delinquent contributions. Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Statement of the Case

These three actions (consolidated in the Court of Appeals) are brought to collect, for certain employee-benefit welfare trust funds, contributions due from defendant employers. The plaintiffs (petitioners here[1]) are the three union-appointed trustees of the trust funds suing as fiduciaries thereof ("the Alfarone plaintiffs") and a participant in the funds ("Jones"), suing derivatively and on behalf of the class of all participants and beneficiaries.[2] The defendants are the employer-appointed trustees of the trust funds and certain employers who are parties to collective bargaining agreements with a labor organization ("Local 1974") obligating them to pay contributions to the funds.

Federal jurisdiction is asserted in each case on the basis of §§ 502(e)(1) and 515 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1132(e)(1) and 1145; and, in Jones's action, on the additional basis of § 301(a) of the Labor-Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. § 185(a).

The complaints allege that the defendant employers were and are bound by certain bargaining agreements entered into on their behalf (by an employers' association) with Local 1974; that the agreements by their terms cover all work defined therein as tapers' and pointers' work performed within a certain geographical area (New York City and parts of Nassau County, New York); that the agreements require each employer to pay contributions to the trust funds based upon the number of hours worked by their employees in work covered by the bargaining agreements; that the employers have caused employees to perform

[1] The Court of Appeals' decision refers to petitioners as "plaintiffs" and to respondents as "defendants"; for convenience the same terminology is employed here.

[2] In the first two cases, suit was brought by the Alfarone plaintiffs and Jones moved to intervene. In the third, Jones brought suit and the Alfarone plaintiffs joined as co-plaintiffs.

such work and have thereby become obligated to pay contributions to the funds; that the employers have failed and refused to pay such contributions; and that as a result, moneys are owing the funds by the employers.

The complaints additionally allege (as a second cause of action, against the employer-appointed trustees) that the plaintiffs have duly demanded of the employer-appointed trustees that the latter take action or join in an action with the Alfarone plaintiffs to collect for the funds the contributions due from the employers; that the employer-appointed trustees have failed and refused to do so; and that by reason of such failure and refusal the employer-appointed trustees have breached the fiduciary duties owed by them to the funds.

The district court had before it, in connection with a companion case,[3] copies of the relevant collective bargaining agreements and trust agreements, and these were subsequently before the Court of Appeals as plaintiffs' exhibits.

Except for such documents as were before it in the companion case, however, the district court had no evidence before it.

The bargaining agreements are construction industry prehire agreements and require, by their terms, that each employer pay contributions to the funds on behalf of all his employees who perform covered work within the geographical area covered by the agreement. (See: App. C, 24c)

The trust agreements provide that if the union trustees and the employer trustees deadlock on an issue that comes before them for decision as a body they shall arbitrate it.

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[3] The district court's decision dismissing the complaint in that companion case is reprinted in App. B, 15b-23b. That decision remains non-final and, because of the district court's denial of plaintiffs' motions for certification pursuant to 28 U.S.C. § 1292(b), non-appealable.

The district court dismissed all three complaints. It held that the Alfarone plaintiffs lacked standing to sue to collect the delinquent contributions because they had not arbitrated with the employer-appointed trustees the question whether the latter should join with the former in suing (App. B, 12b, 13b, 14b). It held that Jones had no standing because his claim was not "uniquely personal"; App. B, 11b.

The district court added, as *dicta*, that even if plaintiffs had standing, there were no contributions due. *Ibid.* Its reasoning on this latter point was based upon a misreading of the bargaining agreements (App. B, 21b-22b; App. C, 24c, 30c).[4] Its misreading, however, even if shared by

[4] The bargaining agreement provisions (Art. XXI, Secs. 1, 2, 3, 4 (App. C, 24c-29c))that require employers to contribute to the funds on behalf of employees who perform covered work make no distinction between employees who are, and those who are not, members of the union. Neither do the provisions, elsewhere in the bargaining agreement, that relate to wages, hours and working conditions. Indeed, if an agreement did discriminate in favor of union members in this regard (*e.g.*, by limiting its terms to union-member employees), it would be patently illegal; *cf. Radio Officers' Union v. NLRB*, 347 U.S. 17, 47-48 (1953).

It is thus irrelevant here what union (if any) the employees, or some of them, belonged to so long as they were employed by signatory employers to perform, and did perform, covered work. Similarly irrelevant is whether Local 1974 did or did not enjoy majority status on any particular job, since the bargaining agreements are unrepudiated pre-hire agreements; *cf. Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1975).

The district court overlooked Secs. 1 to 4 of Article XXI (App. C, 24c, 25c, 26c, 29c), and misread another provision, Sec. 7 (App. C, 30c) that deals with contributions earned by locally-based employees working outside the covered geographical area. That provision provides, in order to protect the plan credits of such employees, that such contributions be paid to the locally-based funds rather than to whatever fund exists in the locality where such "out-of-town" work is performed. Since Sec. 7 refers to such locally-based employees as journeymen and apprentices "of Local 1974," however, the district court and, possibly, the

footnote continued on following page)

the Court of Appeals (*see:* App. A, 4a, 5a), is immaterial here. Neither court based, nor could base, its decision upon such misreading.

Plaintiffs duly appealed to the Second Circuit from the dismissals of their complaints. On Appeal, the three cases were consolidated and decided together. The Court of Appeals affirmed the district court's decisions.

The Court of Appeals affirmed dismissal of the suits brought by the union-appointed trustees on the ground that they had not arbitrated with the employer-appointed trustees, before bringing suit, the question whether the latter should join with the former in bringing suit. It added, further, that by suing the union-appointed trustees had violated § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) (App. A, 7a-8a), which requires that trust agreements governing employer-contributed funds contain clauses that provide for joint "administration" of the funds and provide that if the union-appointed and employer-appointed groups deadlock "on the administration of such fund," arbitration shall be available. Additionally, the court below reasoned that the result it thus reached, denying the union-appointed trustees' standing to sue to collect contributions until they have arbitrated such preliminary issue, was mandated by what the court termed a "firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases." (App. A, 8a)

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footnote continued from preceding page)

Court of Appeals (App. A, 5a) were misled into supposing that the bargaining agreements as a whole cover only members of Local 1974.

Neither court had before it any evidence as to who the employees who performed the work were, to what union (if any) they belonged, or by whom they were directly employed. As a result, no matter what its misreading of the bargaining agreements, neither court below could base its decision upon a determination of what contributions, if any, were due the funds.

Since the courts' decisions below were based on lack of standing, and not upon their misunderstanding of the bargaining agreements, the latter is not material to this petition for certiorari.

The court below also affirmed dismissal of the suit brought by Jones, the participant, and the denial of his motions to intervene as co-plaintiff in the other suits. After noting that Jones was not suing in connection with benefits "uniquely personal" to himself, it held that the refusal of trustees to bring suit to recover delinquent contributions is not a breach of their fiduciary responsibilities; and that therefore, because a participant may sue derivatively only if he establishes that the trustees breached their fiduciary duties, Jones had no standing to sue (App. A, 9a).

Plaintiffs promptly moved the Court of Appeals for rehearing, with a suggestion for rehearing *en banc*. Their motion was denied on May 22, 1986. App. A, 10a.[5]

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[5] After the Court of Appeals' decision, the union-appointed trustees attempted, through the procedures of the American Arbitration Association, to obtain agreement on an impartial aribitrator to resolve the dispute. The employer-appointed trustees refused to participate and commenced a proceeding, in the Supreme Court of the State of New York, County of New York, to enjoin any arbitration of the issue, "on the grounds that no valid agreement exists between the parties requiring arbitration," as well as on the grounds of waiver, estoppel, and *res judicata*. *In the Matter of the Application of Employer Trustees of the Tapers Industry Insurance and Annuity Funds for a Judgment Staying the Arbitration Commenced by Union Appointed Trustees, etc.*, Index No. 15737/86. After the Association wrote them, advising that it would not proceed without their consent but requesting such consent, the employer-appointed trustees withdrew the proceeding but wrote the Association refusing consent to the arbitration.

The union-appointed trustees thereupon commenced a proceeding in federal district court for appointment of an arbitrator; *In the Matter of the Arbitration between Union-Appointed Trustees, etc., and Employer-Appointed Trustees, etc.*, U.S.D.C., S.D.N.Y. M-55. The employer-appointed trustees oppose such proceeding and have asked the court to enjoin the union-appointed trustees from demanding arbitration. The matter remains pending. No possible resolution of it, however, could moot the instant case—for even if an arbitration decision were rendered the date of this petition, directing the employer-appointed trustees to join in suit to collect the delinquent contributions, and such suit were instituted the same day, such suit would be barred by ERISA's six-year statute of limitations from claiming that portion of the contributions that accrued from July 1, 1980, to August 19, 1980.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has decided, in conflict with decisions of the courts of appeals of other circuits and contrary to Congress' intent as explicated in decisions of this Court, two questions of great importance to the collection under ERISA of delinquent contributions owed by employers to employee-benefit trust funds. Specifically, its decision holds:

(a) that union-appointed trustees of an employee-benefit trust fund are barred from suing to enforce § 515 of ERISA and thus recover delinquent contributions owed the fund without the participation of the employer-appointed trustees as co-plaintiffs, unless the union-appointed trustees have first arbitrated with the employer-appointed trustees the question whether the latter should join them in bringing suit (App. A, 8a); and

(b) that the refusal of trustees of an employee-benefit trust fund to bring suit to collect delinquent contributions is *not* a breach of their fiduciary duty to the fund; so that, consequently, a participant who has unsuccessfully demanded that they bring suit *lacks* standing to sue on behalf of the fund either to recover the contributions or to otherwise remedy the trustees' failure to sue (App. A, 9a).

By each of its holdings, the court below has rendered more difficult the collection of delinquent contributions under ERISA. By its first holding, it has enabled some of the trustees of a fund to block others from suing to collect contributions pending arbitration of a spurious issue between them. By its second holding, it immunized delinquent employer trustees from legal or equitable responsibility for their failure to pay and collect such contributions. In both holdings, the court below undercut the Congressional intent expressed in ERISA.

A. Standing of Union-Appointed Trustees to Sue

As will be pointed out below, the first of the two holdings below is in conflict with decisions of the Third and Ninth Circuits, in *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 924, 940 (3d Cir. 1985) and *Amaro v. Continental Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984), respectively, which hold that a contractual agreement to arbitrate should not bar or delay suit to enforce a federal statutory right provided by ERISA. It runs counter, also, to the principle, established by this Court in a line of decisions running from *McKinney v. Missouri-Kansas-Texas Co.*, 357 U.S. 265, 269 (1958) and *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 357 (1971) to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 738, 742 (1981) and *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984), that a contract to arbitrate should not bar or delay suit to enforce a statutory right that expresses a public policy concern.

In conflict with *Barrowclough* and *Amaro*, the decision below asserts that a "firmly established federal policy *favoring* exhaustion of administrative remedies in ERISA cases" (*emphasis supplied*) would be violated if union-appointed trustees were permitted to sue without first arbitrating with the employer-appointed trustees the issue whether all should join in bringing suit. App. A, 8a. In fact, that supposedly "firmly established federal policy" has been firmly rejected by the Third and Ninth Circuits in *Barrowclough*, 752 F.2d at 940, and *Amaro*, 724 F.2d at 752, *supra*. And with specific regard to ERISA delinquency collection suits, the "firmly established federal policy" would appear to run counter to this Court's decisions in *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 372 (1984) (holding that no presumption of arbitrability, as regards arbitration under collective bargaining agreements, is applicable to ERISA delinquency collection cases) and *Central States Pension Fund v. Central Transport, Inc.*, ____ U.S. ____, 105 S.Ct. 2833, 86 L.Ed.2d 447

(1985) (establishing a fiduciary responsibility under ERISA to collect delinquent contributions promptly).

B. Standing of Participant to Sue.

The second holding below, denying that the trustees' refusal to sue to recover delinquent contributions owing the fund is or may be a breach of fiduciary duty, and thus denying the right of a participant or beneficiary who has unsuccessfully demanded that they recover such contributions to bring suit himself, is in direct conflict with the well-established rule that where trustees wrongfully fail to sue to recover such contributions a beneficiary or participant may do so. The Third Circuit has re-affirmed that rule as a rule of federal common law under §§ 301(a) of the LMRA, in *Nedd v. United Mine Workers,* 556 F.2d 190, 197 (1977).[6] The same circuit has held the rule applicable under ERISA in *Struble v. Brewery Empl. Welfare Trust Fund,* 732 F.2d 328, 337 (1984).

Moreover, the holding below that the trustees' refusal to sue to recover delinquent contributions is *not* a breach of fiduciary duty under ERISA is in direct conflict with this Court's decision in *Central States Pension Fund, supra,* ____ U.S. at ____, 105 S.Ct. at 2841, 86 L.Ed.2d at 459.

C. Congress's Policy

Of greatest concern, however, is the conflict between the two holdings below and Congress's purpose in enacting ERISA.

In §§ 2(a) and (b) of ERISA, 29 U.S.C. §§ 1001(a) and (b), Congress found that employee-benefit plans are "affected with a national public interest" and that the interests of employee-participants and of their beneficiaries

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[6] This Court has cited *Nedd, supra,* with approval, for the proposition, "We have not taken a restrictive view of *who* may sue under § 301 for violations of such contracts"; *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 25, n. 28 (1983).

in such plans should be protected "by providing for . . . ready access to the Federal courts."

Those Congressional findings are plainly applicable to delinquency collection claims. As this Court has noted, "one of the principal congressional concerns motivating the passage of the Act" was "that plans should assure themselves of adequate funding by promptly collecting employer contributions." *Central States Pension Fund v. Central Transport, Inc., supra,* ____ U.S. at ____, 105 S.Ct. at 2845, 86 L.Ed.2d at 464. The dangers of failing to collect such contributions promptly were and are obvious: "[f]or a plan passively to allow an employer to create such unfunded liabilities would jeopardize the participants' and beneficiaries' interests as well as those of all participating employers who properly comply with their obligations." *Ibid.*

Accordingly, by §§ 403(c)(1) and 406(a)(1)(B) of ERISA as originally enacted, 29 U.S.C. §§ 1103(c)(1) and 1106(a)(1)(B), Congress created what this Court has termed "a trustee responsibility for assuring full and prompt collection of contributions owed the plan," thereby placing the trustees under a "fiduciary duty to gain immediate use of trust assets for the benefit of the trust . . . and to avoid unfunded liabilities that might eventually prove uncollectable as a result of insolvencies"; *ibid.*, ____ U.S. at ____, 105 S.Ct. at 2841, 2845, 86 L.Ed.2d at 459, 464. In 1980, finding that delinquency collection was still unduly impeded by procedural complexities, Congress (by enactment of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-394, 94 Stat. 1208, added § 515 to ERISA, 29 U.S.C. § 1145, which requires employers to fulfil their contribution obligations, together with a new ¶ (g)(2) to § 502 of ERISA, 29 U.S.C. §1132(g)(2), which provides for specific additional remedies, including interest, liquidated damages, and mandatory attorneys' fees in any suit brought successfully "by a fiduciary" to enforce § 515.

The holdings below, however, upset Congress's scheme. Those holdings immunize fund trustees from their responsibility to assure prompt collection of contributions; additionally, they obstruct suit by fiduciaries and participants to enforce the contribution requirement. If allowed to stand, those holdings will defeat Congress's purpose of assuring and requiring prompt collection of contributions owed to employee-benefit trust funds.

II.

Congress's scheme, set out carefully in ERISA and in the amendments made to ERISA by MPPAA, is that suit to enforce an employer's statutory contribution obligation (set forth in § 515 of ERISA) may be brought by any fiduciary, or by any several fiduciaries, of an employee-benefit trust fund. Congress sought to "simplify delinquency collection" by eliminating procedural obstacles and preconditions to such suit. *Cf. Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 87 (1982); Senate Comm. on Labor and Human Resources, § 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess. 44 (Comm. Print, Apr. 1980).

By §§ 306(a) of MPPAA, Congress added a new § 515 of ERISA, 29 U.S.C. § 1145, setting forth the employer's statutory obligation to pay to an employee-benefit fund the contributions that he is obligated by the bargaining or trust agreement to pay. Specifically, MPPAA added it *to Title I* of ERISA. Suit to enforce any provision of that Title may be brought "by a participant, beneficiary or fiduciary" of a fund. *See:* § 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

Moreover, by § 306(b) of MPPAA, Congress added a new paragraph, (g)(2), to § 502 of ERISA, 29 U.S.C. § 1132(g)(2), which provides that, "[i]n any action under this title *by a fiduciary* for or on behalf of a plan to enforce section 515 in which a judgment in favor of a plan is awarded"

(emphasis supplied), the court shall award interest, liquidated damages, reasonable attorneys' fees, costs and other appropriate relief.

In short, Congress intended that "a fiduciary" should have standing to sue to enforce § 515 and to recover delinquent contributions owed the trust fund. Its intended meaning of the phrase "a fiduciary" plainly encompassed the meaning, "a trustee".[7]

The decision of the Court of Appeals undercuts this Congressional intent by holding that, before one or several (*e.g.*, the union-appointed) trustees may bring suit to enforce § 515 of ERISA, he or they must first submit to an arbitrator, in a proceeding with the remaining trustees, the question whether these latter should join the suit as plaintiffs. Obviously, such a preliminary arbitration proceeding, because it could neither resolve the issue of the employer's duty to make contributions nor relieve trustees of their fiduciary obligation to collect them,[8] would merely serve to long delay the bringing of suit to recover delinquent contributions.

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[7] In §§ 404(a)(1), 405(a) and 406(b)(2) of ERISA, 29 U.S.C. §§ 1104(a)(1), 1105(a) and 1106(b)(2), Congress made imposed various fiduciary obligations upon "a fiduciary," including responsibility for the breaches of "another fiduciary" or "such other fiduciary". In *NLRB v. AMAX Coal Company*, 453 U.S. 322, 332-333 (1981), this Court explained the meaning of those provisions and, in explicating them, substituted (as synonymous) the phrases "a trustee" and "each trustee" for the statutory phrase, "a fiduciary"; and substituted the words "every other trustee" for the statutory phrases, "another fiduciary" and "such other fiduciary".

It is thus clear from this Court's analysis in *Amax, supra,* (as well as from the statute itself) that when Congress provided for suit by "a fiduciary" to enforce the statutory obligations imposed by § 515 of ERISA, its intent was that any trustee of an employee-benefit fund have standing to bring such suit. *Compare:* the decision below, App. A, 7a, n.1.

[8] See: *Struble v. N.J. Brewery Emp. Welfare Trust Fund*, 732 F.2d 325, 334, 335, 338 (3d Cir. 1984): "The fact that the Trustees submitted their dispute to the Umpire would be irrelevant if the dispute itself were the result of a breach of fiduciary duty. . . . The Umpire is not empowered to decide questions of fiduciary breach, so his decision clearly is not directly relevant to our inquiry. . . . Such a breach . . . would render the entire Umpire process irrelevant."

The decision below advances two arguments in its support. One is its suggestion (App. A, 7a-8a) that enforcement of the contractual arbitration provisions as a bar to suit is mandated by § 302(c)(5)(B) of the LMRA, 29 U.S.C. § 186(c)(5)(B), which directs that trust agreements of employer-contributed funds provide for joint "administration" of the funds and for arbitration where the union-appointed group and the employer-appointed group deadlock "on the administration of such fund." However, the Seventh Circuit has held that a dispute between trustees as to whether they should bring suit to recover delinquent contributions is not a dispute "on the administration of such fund" but, instead, "falls within the category of extraordinary matters not included in the administration of trust funds"—so that one group of trustees may not, under § 302(c)(5), compel the other to arbitrate such a dispute. *Farmer v. Fisher,* 586 F.2d 1226, 1230 (1978), *overruled on another issue, Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433, 442 (1983), *aff'd sub nom. Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364 (1984).[9] In short, § 302(c)(5) was not intended to apply to questions of delinquency collection.

The second argument advanced by the court below is that "a firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases" requires that union-appointed trustees be barred from bringing suit to collect delinquent contributions until they have arbitrated, with the employer-appointed trustees, the question whether the latter should join in bringing suit; App. A, 8a.

The assertion of a "firmly established federal policy" requiring arbitration and, in particular, its application to delinquency collection cases, would appear clearly out of

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[9] As the court pointed out in *Geigle v. Flacke,* 590 F.Supp. 1068, 1070, n. 2 (E.D.N.Y. No. 1984), "the *Prosser's* court explicitly stated that it was 'overruling' *Farmer* only to the extent that case was inconsistent with the holding in *Prosser's* that pension trustees may come into court (to collect allegedly delinquent employer contributions) 'without first getting the union to invoke the machinery of arbitration.'"

harmony with, if not directly in conflict with, this Court's decision in *Schneider Moving & Storage Co. v. Robbins, supra,* 466 U.S. at 372, that no presumption of arbitrability under the collective bargaining agreement is applicable to ERISA delinquency collection suits.

Moreover, the existence of any federal policy favoring exhaustion in ERISA cases has been firmly denied by the Ninth Circuit in *Amaro, supra,* 724 F.2d at 742 and, subsequently, by the Third Circuit in *Barrowclough, supra,* 752 F.2d at 940. Those circuits assert a contrary federal policy, expressly *dis*favoring contractual arbitration requirements where statutory ERISA rights or obligations are concerned. And this Court's decisions in *McKinney, U.S. Bulk Carriers, Alexander, Barrentine* and *McDonald, supra,* suggest that it is this contrary federal policy, asserted by the *Amaro* and *Barrowclough, supra,* that is in reality "firmly established."

Specifically, the Third and Ninth Circuits pointed out in *Amaro* and *Barrowclough, supra,* that statutorily based ERISA claims are within the exclusive jurisdiction of the federal courts, that contractual arbitration proceedings are not appropriate to such claims, and that exhaustion of contractual arbitration procedures is not a precondition to bringing such a claim in federal court. And see: *McLendon v. Continental Group,* 602 F.Supp. 1492, 1505 (D.N.J. 1985); *Lewis v. Merrill, Lynch, Pierce, Fenner & Smith,* 431 F.Supp. 271, 274-278 (E.D. Pa. 1977).

Citing this Court's decisions in *Barrentine v. Arkansas-Best Freight System, Inc.,* and *Alexander v. Gardner-Denver Co., supra,* the Third Circuit remarked in *Barrowclough, supra,* 752 F.2d at 940 that "[t]here is an inherent incompatibility in referring to an arbitrator claims that fall within the exclusive jurisdiction of the federal courts and that arise as part of a comprehensive federal statutory scheme designed to assure protection to those individuals who fall within it." Noting the "complex and evolving body of federal law designed [by Congress in ERISA] to

protect the benefits of the vast number of workers covered by employee benefit plans" (*Ibid.*, 752 F.2d at 940-941), the Third Circuit held (at 941) that Congress's intent "would be frustrated if arbitrators, who are not bound to consider law or precedent in their decisions, and who decide issues primarily on contractual grounds, had a conclusive role in deciding such claims."

The holdings of the Third and Ninth Circuits are in clear harmony with (and plainly supported by) the principle established by this Court in the line of decisions cited *supra: McKinney,* 357 U.S. at 268; *U.S. Bulk Carriers,* 400 U.S. at 357; *Alexander,* 415 U.S. at 357; *Barrentine,* 450 U.S. at 783, 792; *McDonald,* 466 U.S. at 292—in which this Court has held that a federal statutory claim supported by public policy should not be barred, nor should its prosecution in a federal district court be delayed or impeded, by contractual provisions that purport to require arbitration as a precondition to suit.

As this Court remarked in *U.S. Bulk Carriers, supra,* 400 U.S. at 357, "[w]e hesitate to route this claimant through the . . . administrative remedy of the collective agreement and shut the courthouse door on him when Congress . . . has said that it is open to members of his class." Nor should the courthouse door be shut on a claimant, or the claimant be routed through contractual arbitration procedures, merely because the determination of his statutory claims "may necessarily involve interpretation of a collective bargaining agreement"; *McKinney v. Missouri-Kansas-Texas R. Co., supra,* 357 U.S. at 268.

Application of these principles to suits for enforcement of § 515 of ERISA—i.e., to enforcement of the employer's *statutory* obligation to make contributions to an employee-benefit trust fund—is obviously in accordance with and, indeed, is mandated by, the congressional purposes that motivated enactment of ERISA and MPPAA. As noted above (and as repeatedly noted by this Court), one of Congress's principal purposes in enacting ERISA and

MPPAA was to "simplify delinquency collection" and to require that plans assure themelves of adequate funding by *promptly* collecting employer contributions. *Kaiser Steel Corporation v. Mullins, supra,* 455 U.S. 87: *Central States Pension Fund v. Central Transport, Inc., supra,* ____ U.S. at ___, 105 S.Ct. at 2845, 86 L.Ed.2d at 464. The placing of unnecessary procedural obstacles or prerequisites in the path of delinquency collection, by contractual agreement or otherwise, runs counter to that purpose and threatens to defeat the entire federal statutory scheme that Congress designed for the protection of fund participants and their beneficiaries.

It thus follows that the [first] holding of the Court of Appeals in the instant case, denying the right of the union-appointed trustees of an employee-benefit fund to sue for collection of delinquent contributions until they have first arbitrated, with the remaining trustees, the question whether the latter should join in bringing suit, is in sharp conflict with principles established in a long line of decisions of this Court, and with the well-reasoned decisions of two other circuits. It is likewise in conflict with the Congressional purposes underlying ERISA and MPPAA. Contrary to those purposes, the decision below obstructs access to the courts for enforcement of an employer's statutory duty to pay contributions to an employee-benefit fund, and thus defeats Congress's intent.

III.

The Court of Appeals' second holding is that a beneficiary or employee-participant in an employee-benefit trust fund may not sue under either the LMRA or ERISA to remedy the refusal of fund trustees to recover employer contributions due the fund, for the reason that the trustees' refusal to sue to recover such contributions does not constitute breach of their fiduciary obligations. (App. A, 9a).

On this point, the decision of the Court of Appeals is in conflict with the principles laid down by this Court in

Central States Pension Fund v. Central Transport, Inc., supra, and with decisions of the Third Circuit.

In *Central States,* ____ U.S. ____, 105 S. Ct. at 2841, 86 L.Ed.2d at 459, this Court has held that the common law fiduciary obligations of a trustee "to take control of [trust property] without necessary delay" are applicable under ERISA; and that among the specific statutory requirements of ERISA is § 406(a)(1)(B) thereof, 29 U.S.C. § 1106(a)(1)(b) which, the Court observed, "would certainly create a trustee reponsibility for assuring full and prompt collection of contributions owed to the plan." *Central States Pension Fund v. Central Transport, Inc., supra,* ____ U.S. at ____, 105 S.Ct. at 2841, 86 L.Ed.2d at 459 (at notes 13, 16). These obligations establish what the Court referred to in a subsequent discussion, *ibid,* ____ U.S. at ____, 105 S.Ct. at 2845, 86 L.Ed.2d at 464, as "the trustees' fiduciary duty to gain immediate use of trust assets for the benefit of the trust."

In *Nedd v. United States Workers,* 556 F.2d 190, 197 (1977), the Third Circuit stated the established rule succinctly:

> Where the trustee may sue and wrongfully fails to do so, the beneficiary may sue the trustee as well as the party or parties the trustee failed to sue.

That rule is well established at common law: *Cf. Riviera Congress Assoc. v. Yassky,* 18 N.Y.2d 540, 547, 228 N.E.2d 876 (1976) ("It is fundamental to the law of trusts that *cestuis* have the right . . . to sue for the benefit of the trust on a cause of action which belongs to the trust if 'the trustees refuse to perform their duty in that respect' "); G. Bogert & G. Bogert, *Law of Trusts and Trustees,* § 869 (2d Ed. Rev'd 1982); 2 A. Scott, *Law of Trusts,* § 175 (3d ed. 1967).

In *Struble v. N.J. Emp. Welfare Trust Fund,* 732 F.2d 328, 337 (1984), the Third Circuit specifically held this principle applicable to suits brought under ERISA.

That principle has, however, been rejected by the decision below. By affirming dismissal of the Jones's complaint on a Rule 12, Fed.R.Civ.P. motion before any evidence could be submitted as to the employer's obligation to pay contributions, the court below thus denied to plaintiffs in Jones's position any opportunity to prove that the trustees' refusal breaches the latter's fiduciary duty. It leaves employee participants and beneficiaries of an employee-benefit trust fund without any remedy at all for the trustees' refusal to recover delinquent contributions.

In so doing, the decision below is in conflict with the decisions of at least one other circuit and of this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 867, 892, 893—August 1985 Term

(Argued: March 10, 1986 Decided: April 14, 1986)

Docket Nos. 85-7899, 85-7901, 85-7997

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY AND ANNUITY FUNDS,

Plaintiffs-Appellants,

—v.—

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., AND QUICK-WAY FINISHERS INC.,

Defendants-Appellees.

Before:

KEARSE and CARDAMONE, *Circuit Judges*, and POLLACK, *Senior District Judge.**

Consolidated appeals from orders of the Eastern District of New York, Eugene H. Nickerson, Judge, dismissing, for lack of standing on the part of the plaintiffs, two suits brought by less than a majority of the trustees of employee-benefit plans against the participating employers, and a third suit by an employee participant and beneficiary of the plans, all three suits seeking to recover fringe benefit contributions allegedly owed to the plans.

Affirmed.

HALL & SLOAN, New York, NY (Burton H. Hall, New York, NY, of counsel), *for Appellants*

AVRAM H. SCHREIBER, Esq., New York, NY, *for Appellee, Employer Trustees*

KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN, New York, NY (Brian J. Gallagher, New York, NY, of counsel), *for Appellee, Bernie Wolff Construction Corp.*

* Honorable Milton Pollack, United States District Judge for the Southern District of New York, sitting by designation.

RUSKIN, SCHLISSEL, MOSCOU, EVANS & FALTISCHEK, P.C., New York, NY (Richard Guy Leland, Mineola, NY, of counsel), *for Appellee, Component Assembly, Inc.*

ALBANESE, ALBANESE & FIORE, Esq., Garden City, NY, *for Appellees, Nastasi-White, Inc., and Circle Industries Corp.*

POLLACK, *Senior District Judge*:

This litigation involves three actions brought by union-appointed trustees of the Tapers Industry Insurance Fund and the Tapers Industry Annuity Fund (the Funds), and by a participant and beneficiary of the Funds claiming individually and on behalf of others similarly situated, to recover fringe benefit contributions and liquidated damages allegedly due the Funds from employers. Plaintiffs also claim that the employer-appointed co-trustees who have been named as nominal defendants, breached their fiduciary duties by not joining as plaintiffs in the suits.

Jurisdiction is based on the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(e)(1) (1982).

The employers moved to dismiss the suits on the ground that the trust agreements involved require the plaintiffs to submit their complaints to arbitration in the first instance, and on the further ground that nothing was due to the Funds because none of the members of the Union were involved in the work which is the subject of the complaints.

The District Court, Nickerson, J., dismissed the suits on the grounds that the union-appointed trustees lacked standing to sue for recovery of allegedly delinquent contributions without first obtaining an arbitration decision directing the employer-appointed trustees to join them, and that the collective bargaining agreements, requiring payment of fringe benefit contributions, apply only to work performed by members of the Union.

Discussion

I. *Background*

The employer-defendants and the Drywall Tapers and Pointers of Greater New York, Local Union 1974 (the Union), an arm of the construction industry, entered into ongoing collective bargaining agreements within the scope of § 8(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(f) (1982).

Each agreement covers all work defined therein as "Tapers' and Pointers' work," performed within a specified geographical area (New York City and parts of Nassau County). Each contains a Union shop clause requiring employees who are members of Local 1974 to remain members, and requiring every journeyman or apprentice employed by an employer who is not a member to become a member of Local 1974 by the eighth day of his employment. Each also contains a no-subcontracting clause prohibiting employers from subcontracting any taping, pointing, or other covered work to any journeyman or to any employer not under contract with Local 1974.

In addition, each agreement obligates each employer to pay contributions to the Tapers Industry Insurance and

Annuity Funds in weekly amounts measured by the wages of each employee who is a member of Local 1974 equal to 32% of the hourly wages received from the employer.

Each Fund is governed by six trustees, three appointed by the Union (Local 1974), and three by or on behalf of the employer-defendants. The trust agreements and the Taft-Hartley Act, 29 U.S.C. § 186(c)(5)-(8), require equal representation in the administration of the Funds, i.e., the operation and administration of the Funds is the joint responsibility of the Union-appointed and of the employer-appointed trustees (Art. III Trust Agreements).

The complaints set forth claims based on alleged delinquency in making payments to Local 1974 of the allegedly required contributions. Plaintiffs claim that the employers-defendants employed plasterers, members of Local 530 of the Operative Plasters and Cement Masons International Association to perform work which, pursuant to the collective bargaining agreements with Local 1974, should have been performed by its members and that because the work performed "belonged" to Local 1974, the employers-defendants were obligated to make contributions to the Funds, as if Local 1974 members had been employed.

No claim is made by plaintiffs that Local 1974 members have performed work for which benefit contributions are due; nor do they claim that the employers have hired non-union workers. The core claim is that the kind of taping work done for the employers by Local 530 belonged to Local 1974. The employers' position is that they employed subcontractors, whose employees were members of Local 530, to perform such taping work in accord with an allocation of work made for the unions respectively by the 1978 Hearings Panel Decision. The

long-standing jurisidictional dispute between the two unions as to their respective spheres of drywall work was decided in *Drywall Tapers & Pointers v. Operative Plasterers' Association*, 601 F.2d 675 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

II. *Trustees' Suits*

The trustees of the Funds are evenly divided on whether there is any delinquency in contributions due Local 1974 and whether suit against the employers is justified; the three employer-appointed trustees have refused to authorize these suits. The trust agreements provide for arbitration in the event of such deadlock. However, the Union-appointed trustees failed to pursue this administrative remedy before bringing these actions.

The trust agreements provide that the trustees may take any action necessary to enforce payment of the contributions due thereunder including, but not limited to, proceedings at law and in equity. However, the agreements specify that "all action by the Trustees shall be by majority decision." Moreover, in the event of a deadlock, the trustees must submit any dispute to arbitration.

The trust clauses prescribing majority action by the trustees as to all aspects of the agreements read:

> Such majority vote shall govern not only this Article but any portion of this Agreement and Declaration of Trust which refers to action by the Trustees. In the event any matter presented for decision cannot be decided because of a tie vote, the matter shall remain in status quo pending arbitration as set forth in Article VIII hereof.

The arbitration section reads:

> In the event the Trustees cannot decide any matter or resolve any dispute because of a tie vote or in the event decisions cannot be made because of the lack of a quorum at two successive meetings of the Trustees, then and in either of such events the Trustees shall attempt to select an impartial arbitrator to hear and determine the matter, issue or dispute. . . .

These trust provisions are mandated by the Labor Management Relations Act (LMRA) § 302(c)(5) as a condition of the existence of all union pension and benefit funds. 29 U.S.C. § 186(c)(5). The purpose of equal representation provisions such as these is to prevent misuse of funds by labor officials who would otherwise have sole control of contributions by the employers. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 n.13 (1981); *Rosenthal v. Ann Service Corp.*, 571 F. Supp. 1229, 1232 (S.D.N.Y. 1983).

Plaintiffs' filing of this suit without either receiving the approval of a majority of the trustees or employing the arbitration procedure contravenes both the Taft-Hartley Act and the trust agreements. 29 U.S.C. § 186(c)(5); *see Rosenthal*, 571 F. Supp. at 1232.

Plaintiffs contend that the Union-appointed trustees are fiduciaries of the plans and thus have standing to sue as fiduciaries under ERISA § 502[1], without first comply-

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1 It is questionable whether the Union trustees are even fiduciaries under ERISA. A person is only a fiduciary for purposes of ERISA to the extent that he exercises discretionary control over the administration of a plan. 29 U.S.C. § 1002 (21) (A); *see Thornton v. Evans*, 692 F.2d 1064, 1077 (7th Cir. 1982). The trust agreements, in this case, reserve discretionary power to sue to a majority of the trustees.

ing with the requirements of administration of the funds by a majority of the trustees and of resolution of any dispute by arbitration.

The limitation in the trust agreements on the powers and duties of less than a majority of the trustees under the instant plans is consistent with the power granted fiduciaries to bring a civil suit under ERISA. ERISA expressly requires that the acts of trustees be in accordance with the trust agreements, 29 U.S.C. § 1104(a)(1), and expressly contemplates joint administration of trust funds. 29 U.S.C. § 1102(a)(1). ERISA does not abrogate the equal representation mandates of the Taft-Hartley Act. 29 U.S.C. § 1144(d).

The plans involved in these suits have expressly provided a remedy for deadlock among the trustees on the question whether to sue under the trust agreements for contributions. Before pursuing judicial remedies, the trustees must comply with the arbitration procedures. *See O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 168 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1181 (1985). Permitting the Union-appointed trustees to sue without first submitting the issue to arbitration would violate the firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases. *See Kross v. Western Electric Co.*, 701 F.2d 1238, 1244 (7th Cir. 1983). Because the trustees have not exhausted their administrative remedies, their actions are premature and were properly dismissed.

III. *Beneficiary's Suits*

The third suit involved in these appeals, brought by Jones, a member of Local 1974 suing individually and on

behalf of others similarly situated, was also properly dismissed. ERISA empowers individual beneficiaries to bring civil actions to recover benefits due them or to enforce personal rights, 29 U.S.C. § 1132(a)(1)(B), or to seek injunctive or other equitable relief. *Id.* § 1132(a)(3). Jones does not seek to recover benefits due him under the plan, nor the benefits of those for whom he purports to sue; he does not assert a personal claim to enforce uniquely personal rights. *See Thornton v. Evans*, 692 F.2d at 1079 n.35; *Rosenthal*, 571 F. Supp. at 1233. In addition, Jones does not assert a claim for injunctive or other equitable relief. *See Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 337-38 (3rd Cir. 1984). Thus, he has no standing to bring this action.

Finally, as to Jones' derivative action on behalf of the Funds, such an action can only be brought if the plaintiff first establishes that the trustees breached their fiduciary duty. *See Struble* 732 F.2d at 336. Jones has failed to establish that the employer-appointed trustees breached their fiduciary duty; their refusal to file a suit to recover contributions allegedly due does not constitute such a breach. *See Ironworkers Local No. 272 v. Bowen*, 695 F.2d 531 (11th Cir. 1983).

Accordingly, the decision below is

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 85-7899, 85-7901, 85-7997

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of May one thousand nine hundred and eighty-six.

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Plaintiffs-Appellants,

v.

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., AND QUICK-WAY FINISHERS INC.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, John Alfarone, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith

ELAINE B. GOLDSMITH
CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
84 C 4028

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund,

Plaintiffs,

against

BERNIE WOLFF CONSTRUCTION CORP. and EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Defendants.

[Names of Counsel Omitted]

NICKERSON, District Judge

This is one of a series of cases such as *Alfarone et al. v. Nastasi-White, Inc.*, CV 84-3181, brought in this court for similar relief.

Plaintiffs have made a motion to realign parties. Daniel Jones has moved to intervene. For reasons stated in the memorandum and order dated May 20, 1985 in the *Nastasi-White, Inc.* case, the plaintiff trustees have no standing.

Jones has no standing under the Employment Retirement Income Security Act, 29 U.S.C. §1132(e). He asserts not a personal claim but a claim of the entire bargaining unit.

Jones has no standing under the Labor-Management Relations Act, 29 U.S.C. §185(a). This is not a case of an employee's uniquely personal claim, which in any event would be subject to arbitration under the collective bargaining agreement. He does not allege that he worked for the defendant construction company and was not paid a pension contribution.

Appendix B

The court infers from the records in the previous cases which concern the jurisdictional dispute between two unions and from the allegations in the papers of plaintiffs and Jones that no "wages" were paid by the defendant construction company to Local 1974 members. If that inference is correct, there are as yet no contributions due the fund.

The motions of plaintiffs and of Jones are denied.

The court on its own motion dismisses the complaint.

So ordered.

Dated: Brooklyn, New York
October 16, 1985

/s/ Eugene H. Nickerson

EUGENE H. NICKERSON, U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
84 C 4029

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund,

Plaintiffs,

against

COMPONENT ASSEMBLY, INC., and EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Defendants.

[Names of Counsel Omitted]

NICKERSON, District Judge

This case is governed by this court's memorandum and order dated May 30, 1983 in *Alfarone et al. v. Nastasi-White, Inc., et al.*, CV 84-3181.

Plaintiffs have no standing. Nor does the proposed intervenor.

Even if plaintiffs or the prospective intervenor had standing they have no present claim for contributions for the reasons stated in the above case. The court declines to certify any question for review.

Plaintiffs' motions are denied. Defendants' motion to dismiss are granted. The complaint is dismissed. So ordered.

Dated: Brooklyn, New York
October 16, 1985

/s/ Eugene H. Nickerson

EUGENE H. NICKERSON, U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

85 C 2908

DANIEL JONES, individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION-APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Plaintiffs,

against

NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS, INC. and EMPLOYER-APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Defendants.

[Names of Counsel Omitted]

NICKERSON, District Judge

This case is governed by this court's memorandum and order dated May 30, 1983 in *Alfarone, et al v. Nastasi-White, Inc., et al.*, CV 84-3181.

Plaintiffs have no standing. Even if they had, they have no present claim for contributions for the reasons stated in the above case. Defendants' motion to dismiss is granted. Defendants' motion for attorneys' fees, costs and sanctions against plaintiffs is denied. So ordered.

Dated: Brooklyn, New York
October 23, 1985

/s/ Eugene H. Nickerson

EUGENE H. NICKERSON, U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
84 C 3181

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund,

Plaintiffs,

against

NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY CONTRACTING, INC., and
EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Defendants.

NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY CONTRACTING, INC.,

Counterclaim-Plaintiffs,

against

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund;

TAPERS INDUSTRY INSURANCE FUND;

TAPERS INDUSTRY ANNUITY FUND;

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974, OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO;

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO;

LOCAL 530 OF THE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO;

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO;

Appendix B

BUILDING TRADES EMPLOYERS' ASSOCIATION;

METROPOLITAN NEW YORK DRY WALL CONTRACTORS ASSOCIATION, INC.,

BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREATER NEW YORK AND VICINITY, AFL-CIO;

NEW YORK PLAN FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES;

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO; and

JOINT ADMINISTRATIVE COMMITTEE OF THE PLAN FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES IN THE CONSTRUCTION INDUSTRY,

Counterclaim-Defendants.

[Names of Counsel Omitted]

NICKERSON, District Judge

Plaintiffs, the union-appointed trustees of the Tapers Industry Insurance Fund and the Tapers Industry Annuity Fund (the Funds), brought this action to obtain contributions and liquidated damages allegedly due the Funds by defendants Nastasi-White, Inc. and its subsidiaries Circle Industries Corp, and Quick-Way Contracting, Inc. (the employer defendants). Plaintiffs also claim that the employer-appointed Trustees (the employer trustees) breached their fiduciary duties by not joining in the suit. *See* 29 U.S.C. §1104. Jurisdiction is based on the Employment Retirement Income Security Program (ERISA), 29 USC §1132 (e)(1).

Plaintiffs allege that the Funds are employee benefit welfare plans established pursuant to Section 302(c)(5)(B) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c)(5)(B). In July of 1980 Metropolitan New York Dry Wall Contractors' Association, Inc.

(Metropolitan) acting as defendant Nastasi's agent, entered into a collective bargaining agreement with Drywall Tapers and Pointers of Greater New York Local 1974 (Local 1974). In July 1980 Circle also entered into a collective bargaining agreement with Local 1974. The agreements remained in force until July 31, 1983. In July 1983 Metropolitan and Local 1974 entered into a new collective bargaining agreement extending the 1980 agreement with modification to July 31, 1986.

Pursuant to the collective bargaining agreements Metropolitan and Local 1974 also entered into two trust agreements establishing the Funds to provide benefits for "employees" who were members of Local 1974. The agreements are identical for present purposes. Pursuant to the trust agreements each Fund is governed by six trustees, three appointed by Local 1974 and three by Metropolitan.

Plaintiffs bring suit against the employer defendants under 29 U.S.C. §1145 of ERISA, which provides:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Plaintiffs allege that the agreements obligate the employer defendants to make contributions to the Funds on a weekly basis equal to 32% of the hourly wage rate multiplied by the number of hours of work performed by the "employees." Plaintiffs claim that employer defendants should have employed Local 1974 members but instead employed members of another union, Local 530 of the Plasterers and Cement Masons International Association (Local 530), and that the employer defendants are now obligated nonetheless to make contributions as if Local 1974 members had been employed.

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The employer defendants argue as an affirmative defense that the participants in the Funds were not "employees" and thus are not entitled to contributions. The employer defendants claim that they hired as employees members of Local 530 and not members of Local 1974 to perform the pointing and taping work for which contributions are allegedly due. In their counterclaims the employer defendants also seek to have the court set aside its previous decisions, familiarity with all of which is assumed, granting Local 1974 a permanent injunction enjoining Local 530 from asserting jurisdiction over certain jobsites. *See Drywall Tapers v. Local 530,* No. 81-337 (E.D.N.Y. Feb. 2, 1984).

Numerous motions have been made. The employer defendants move (1) to dismiss for lack of standing and (2) to stay discovery until 60 days after the dispute is referred to the Joint Administrative Committee of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Joint Committee); (3) the plaintiffs, the Funds and Local 1974 move to dismiss the employer defendants' and Local 530's counterclaims and crossclaims; (4) the plaintiffs and Local 1974 move to enjoin the Joint Committee from threatening to take any action in regard to this dispute; (5) the Joint Committee and the Building and Construction Trades Department, AFL-CIO (the Building Department) move to extend their time to answer the counterclaims; and (6) the Operative Plasterers and Cement Masons International Association move to amend its answer to assert crossclaims and counterclaims.

I

The court first considers the motion of the employer defendants to dismiss the complaint on the ground that without a majority of the trustees acting as plaintiffs there is no standing.

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The trust agreements establishing the Funds and the Taft-Hartley Act, 29 U.S.C. §186(c)(5)-(8), require equal representation in the administration of the Funds. The trust agreements state in pertinent part:

ARTICLE III TRUSTEES

Section 1. *Number.* The operation and administration of the... [Funds] shall be the joint responsibility of three Trustees appointed by [Metropolitan] and three Trustees appointed by the Union.

ARTICLE V CONTRIBUTIONS TO THE FUND

SECTION 4. *Default in Payment.* . . The trustees may take any action necessary to enforce payment of the contributions due hereunder, including, but not limited to, proceedings at law and in equity.

ARTICLE VII MEETING AND DECISIONS OF TRUSTEES

Section 5. *Majority Vote of Trustees.* All action by the Trustees shall be by majority decision. Such majority vote shall govern not only this Article but any portion of this Agreement and Declaration of Trust which refers to action by the Trustees. In the event any matter presented for decision cannot be decided because of a tie vote, the matter shall remain in *status quo* pending arbitration as set forth in Article VIII hereof.

ARTICLE VIII ARBITRATION

Section 1. *Application of this Article.* In the event the Trustees cannot decide any matter or resolve any dispute because of a tie vote or in the event decisions cannot be made because of the lack of a quorum at two successive meetings of the Trustees, then and in either of such events the Trustees shall attempt to select an impartial arbitrator to hear and determine the matter, issue or dispute. . . .

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> Section 3. *Awards.* The decision or award of the arbitrator shall be in writing and shall be final and binding on all parties and persons concerned. . . .

The Taft-Hartley Act allows employers to make contribution to funds provided that "employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon. . . . '" 29 U.S.C. §186(c)(5). The purpose of the equal representation provision is to prevent misuse of funds by labor officials who would otherwise have sole control of money contributed by the employer. *See National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 330 n.13 (1981); *Rosenthal v. Ann Service Corp.*, 571 F.Supp. 1229, 1232 (S.D.N.Y. 1983).

Both the trust agreements and the Taft-Hartley Act make it clear that plaintiffs alone cannot maintain the suit, whether unanimity or a simple majority of the trustees is required. *See Rosenthal, supra,* 571 F. Supp. at 1232 & n.7. *See also* Bogert, *Trusts and Trustees,* §554 (2d ed. 1980).

Plaintiffs argue that bringing suit to collect contributions is not part of the "administration" of the Funds and thus is not subject to the equal representation provision. The Court of Appeals for the Second Circuit has interpreted "administration" to include all issues which the trustees have the power to decide under the trust agreement. *Barrett v. Miller,* 276 F.2d 429 (2d Cir. 1960); *Mahoney v. Fisher,* 277 F.2d 5 (2d Cir. 1960). The agreements grant the trustees power to proceed "at law and equity" to enforce payment of contributions. Art. V, Sec. 4.

Even if the decision to sue an amployer for unpaid contributions is not usually considered to be part of the "administration" of the Funds within the meaning of Section 186(c)(5) of the Taft-Hartley Act, the trust agreement enlarges the scope of the trustees' administrative duties. *See Struble v. New Jersey Brewery Employers' Welfare*

Trust Fund, 732 F.2d 325, 335 (3d Cir. 1984) and case cited.

Plaintiffs rely on dicta in the *Rosenthal* case, *supra,* 571 F.Supp. at 1232, suggesting that a single trustee may sue an employer so long as the co-trustees are named as defendants or formal demand to join in the suit is made upon all trustees. Plaintiffs have named the employer trustees as defendants, but the record does not indicate that they have been served. Plaintiffs also allege that they requested the employer trustees to join the suit, but do not state precisely when and in what manner the request was made.

Even assuming a formal request was made or the employer trustees were served, the trust agreements require the plaintiffs to make a formal demand on the employer trustees and then after a deadlock to seek the appointment of an arbitrator. *Cf. Schneider Moving & Storage Co. v. Robbins,* 104 S.Ct. 1844 (2d Cir. 1984); *O'Hare v. General Marine Transport Corp.,* 740 F.2d 160, 168 (2d Cir. 1984); *Singleton v. Abramson,* 336 F.Supp. 754, 757 (S.D.N.Y. 1971). The *Rosenthal* opinion did not discuss whether the trust agreement, as here, required an impartial arbitrator to be appointed in the case of a deadlock.

Even if plaintiffs had standing, the court finds that they have no present claim for contributions. The employer defendants did not hire members of Local 1974 as "employees" to do the pointing and taping work. Local 1974 and its members may have a damage claim for lost wages against the employer defendants. But the Trustees constitute a legal entity from the union or its members. Their obligation is to receive and administer the contributions made pursuant to the collective bargaining agreements between local 1974 and the defendant employers.

Those collective bargaining agreements contemplate as a prerequisite to paying contributions to the Funds that the "employees" covered by the agreements in fact be

entitled to "wages." Section 7 of the collective bargaining agreements for the years 1980-83 and 1983-86 provides:

> (a) The Employers shall pay the percentage contributions on the gross *wages* and the annuities for all Journeymen and Registered Apprentices of Local Union 1974 *employed* in any part of the United States. (Emphasis added).

Here the members of Local 1974 were not "employees" and have as yet been paid no "wages" for the period in question.

The Court need not decide whether, if Local 1974 or its members were successful in a suit for damages for lost wages, the lost contributions would be an added element of damages payable to the individual members of Local 1974 or amounts which the plaintiffs could collect on the theory that the damages obtained for loss of wages constituted in themselves "wages." It is enough that there are yet no "wages" "on" which the contributions are payable.

The employer defendants' motion to dismiss for lack of standing is granted.

II

The employer defendants and Local 530 assert counterclaims and crossclaims seeking a declaratory judgment that the court's decision in *Drywall Tapers, supra,* enjoining Local 530 from asserting jurisdiction over the taping and pointing work at certain jobsites is no longer valid. Plaintiffs move to dismiss the counterclaims and crossclaims on the ground that the claims are *res judicata.*

The employer defendants and Local 530 claim that they are not merely relitigating the *Drywall Tapers* case, but asserting new developments since the court's decision which justify relief from judgment. Whether or not such relief is warranted and whether the employer defendants have standing to make such a claim, *see O'Hare, supra,* 740 F.2d at 172, the court need not now decide the issue.

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Local 530 has made the identical motion in the *Drywall Tapers* action and the matter is more appropriately decided as part of that case.

III

The court need not consider the other contentions advanced by the parties.

The employer defendants' motion to dismiss is granted. the employer defendants' and Local 530's counterclaims and crossclaims are dismissed without prejudice to the assertion of their claims in the *Drywall Tapers* case. So ordered.

Dated: Brooklyn, New York
May 30, 1985

/s/ Eugene Nickerson

EUGENE NICKERSON, U.S.D.J.

APPENDIX C

TRADE AGREEMENT

between

Drywall Tapers and Pointers of Greater New York Local union 1974, affiliated with International Brotherhood of Painters and Allied Trades, AFL-CIO

and

Metropolitan New York Dry Wall Contractors Association, Inc.

* * *

ART. XXI, SECTION 1. FRINGE BENEFIT FUNDS. The parties agree that, in addition to the wages to be paid as elsewhere provided in this Agreement, each Employer (whether a member of the Association or not) shall, commencing with the effective date of this Agreement and for the duration thereof, at the close of each weekly pay period, make contributions for such pay period to certain fringe benefit funds on behalf of each employee employed by such Employer and covered by this Agreement, as hereinbelow set forth.

(a) Each such Employer shall pay to the Trustees of the Tapers Insurance Fund, designated under the Agreement and Declaration of Trust dated November 30, 1971, as amended, the terms and provisions of which Agreement and Declaration of Trust are specifically incorporated herein by reference, at the close of each weekly pay period, sums of money equal to the number of hours actually worked, multiplied by the rate of wages per hour of each such employer, as follows: for all pay periods or portions thereof during the periods August 1, 1983 until the expiration of this Agreement, such sums of money shall be equal to 22% of the hourly rate of each such employee, multiplied by the actual weekly hours worked. For each hour or

portion thereof for which an employee actually worked, the Employer shall make a contribution of 46¢ per hour for the Tapers Industry Pension Fund to the trustees of the Tapers Industry Insurance Fund. The sums so paid to the Trustees of the Tapers Insurance Fund shall be applied by the said Trustees as provided in Sections 2 and 3 hereinbelow.

(b) Each such employer shall pay to the Trustees of the Taper Industry Annuity Fund, designated under an Agreement and Declaration of Trust dated October 9, 1972, as amended, the terms and provisions of which Agreement and Declaration of Trust are specifically incorporated herein by reference, at the close of each weekly pay period, sums of money equal to 10% of the hourly rate of each employee, multiplied by the hours actually worked.

(c) Each such employer shall pay to the Trustees of the Local 1974 Taper Apprenticeship and Training Trust, designated under an Agreement and Declaration of Trust dated July 24, 1972, as amended, the terms and provisions of which Agreement and Declaration of Trust are specifically incorporated herein by reference, at the close of each weekly pay period, sums of money equal to one cent (1¢) per hour of employment of each such employee.

(d) Before each payday, each Employer shall deliver to the Tapers Insurance Fund a payrloll report and pay all contributions due for the pay period to the funds. Upon the establishment of a prepayment stamp system, each Employer shall make contributions in accordance therewith. This shall be implemented six (6) months after the date of contract signing.

(e) The union agrees to advise the Employers as to the amounts of contributions payable on a cents-per-hour basis.

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SECTION 2. TAPERS INDUSTRY PENSION FUND. The only agreement between the parties to this Agreement regarding pensions or retirement for employees covered by this Agreement is as follows:

1. (a) Commencing with the first day of August 1971 and for the duration of this Agreement and any renewals or extensions thereof, each Employer, whether a member of the Association or otherwise signatory hereto, agrees to make payments to the Tapers Industry Pension Fund for each employee covered by this Agreement as follows:

(b) For each hour or portion thereof for which an employee receives pay, the Employer shall make a contribution of 71¢ to the above-named Pension Fund, as provided in Section 1 of this Article. This 71¢ per hour is derived as follows: 25¢ from the 22% fringe benefits, plus an additional 46¢ per hour contribution from the employer.

(c) For the purpose of this Article, each hour paid for, including hours attributable to show up time, and other hours for which pay is received by the employee in accordance with this Agreement, shall be counted as hours for which contributions are payable.

(d) Contributions shall be paid on behalf of any employee starting with the employer's first day of employment in a job classification covered by this Agreement. This inncludes, but is not limited to, apprentices, helpers, trainees, and probationary employees.

(e) The payments to the Pension Fund required above shall be made to the "Tapers Industry

Pension Fund," which was established under an Agreement and Declaration of Trust dated . The Employer hereby agrees to be bound by and to the said Agreement and Declaration of Trust, as though he had actually signed the same.

2. Each employer, whether a member of the Association or otherwise signatory hereto, hereby irrevocably designates as its representatives on the Board of Trustees such Trustees as are now serving, or who will in the future serve, as Employer Trustees, together with their successors. Each Employer further agrees to be bound by all actions taken by the Trustees pursuant to the said Agreement and Declaration of Trust.

3. All contributions shall be made at such time and in such manner as the Trustees require; and the Trustees shall have the authority to have an independent Certified Public Accountant audit the payroll and wage records of the Employer for the purpose of determining the accuracy of contributions to the Pension Fund.

4. If an Employer fails to make contributions to the Pension Fund within twenty days from the date required by the Trustees, the Union shall have the right to take whatever steps are necessary to secure compliance with this Agreement, any other provision hereof to the contrary notwithstanding, and the Employer shall be liable for all costs for collection of the payments due together with attorneys' fees and such penalties as may be assessed by the Trustees. The Employer's liability for payment under this Article shall not be subject to or covered by any grievance or arbitration procedure or any "no-strike" clause which may be provided or set forth elsewhere in this Agreement.

5. The Pension Plan adopted by the Trustees of said Pension Fund shall at all times conform with the requirements of the Internal Revenue Code so as to enable the

Employer at all times to treat contributions to the Pension Fund as a deduction for income tax purposes.

SECTION 3. The sums received by the Trustees of the Tapers Insurance Fund pursuant to paragraph (a) of Section 1 of this Article and remaining after the deduction provided for in Section 2 of the Article shall be administered and expended by the Trustees of the said Tapers Insurance Fund pursuant to the Agreement and Declaration of Trust dated the 30th of November, 1971, as amended, for the purposes of:

(i) providing such amounts of life, accident and health insurance, hospitalization insurance, dental care and optical care for Journeyman and Registered Apprentice Employers, their wives and children under 19 years of age, as the Trustees may determine, to pay or provide for similar benefits for the Employees of Local union 1974 of New York City, the Joint Board, and Employees of this Trust and the dependants of such Employees as the Trustees may determine;

(ii) paying or providing for the payment of such old age pensions for Journeymen and Registered Apprentices employed by contributing Employers or serving as elected Officers of Local Union 1974 of New York City or as Employees of the Joint Board as the Trustees may determine. The Trustees are hereby empowered to pay or provide for the payment of old age pension benefits for all Employees of Local Union 1974 of New York City, not otherwise eligible for old age pension benefits under any collective bargaining agreement on the same basis as for Registered Apprentices and Journeymen;

(iii) setting aside from the sums received pursuant to paragraph (a) of Section 1 of this Article on behalf of each Journeyman Apprentice and maintaining as a vacation fund, in a separate and individual account on behalf of such Journeyman or Apprentice sums as follows: out of

all such sums so received based upon pay periods or portions thereof within the period July 1, 1980 to the expiration of this Agreement, sums equal to nine percent (9%) of the actual hours worked multiplied by the rate of wages per hour. The said vacation fund so maintained on behalf of each Journeyman or Apprentice shall be paid to such Journeyman or Apprentice by the said Trustees no less often than once a year.

SECTION 4. TAPER INDUSTRY ANNUITY FUND. The parties have established a Taper Industry Annuity Fund, to make annuities and certain other benefits, including supplemental unemployment benefits, available to Journeymen and Apprentices. Each Employer shall contribute to the Trustees of the Taper Industry Annuity Fund so established at the close of each weekly pay period sums of money equal to 10% of the gross wages payable to each Journeyman or Apprentice.

SECTION 5. "Gross wages" and "gross wages payable" as used this Agreement and in the Trust Agreement referred to in this Article shall mean and include whichever of the two following bases of the percentage contributions may be the greater: (1) the actual total gross earnings of any Employer's Journeymen and Registered Apprentices, or (2) a gross estimated wage figure, subject to readjustment as hereinafter provided, equivalent to three times the Employer's cost of all materials used by him during his fiscal accounting period, as finally computed and assessed at the close thereof.

SECTION 6. The parties agree to execute an agreement based upon the Model Collective Bargaining Clause for Participation in the National Painting and Decorating and Drywall Apprenticeship and Manpower Training Fund, revised and approved by The National Apprenticeship Committee, November 4, 1970 (Preferred clause where-

by funds for the National are channeled through local fund), which agreement shall provide for contributions from each Employer for each of his employees to an Apprenticeship Fund to be established in the sum of 1¢ for each hour or portion thereof for which an employee covered under this agreement receives pay.

SECTION 7. ENFORCEMENT. (a) The Employers shall pay the percentage contributions on the gross wages and the annuities for all Journeymen and Registered Apprentices of Local Union 1974 employed in any part of the United States.

(b) In the event that State or Federal legislation shall be enacted requiring the Employer, during the term of this Trade Agreement, to pay premiums or taxes, measured by the wages of their Journeyman and Registered Apprentices covered by this Agreement for any of the Social Insurance benefits herein provided for, the parties hereto shall, promptly after the enactment of such legislation and within ten (10) days notice after service of written notice by the Association on the Union, commence negotiations in respect to the reduction or elimination of that portion of Employer contributions required by this Agreement as is applied to the purchase of such social insurance benefits which may be provided by the Employer payment of premiums or taxes under such State or Federal legislation; and in the event that the parties fail within thirty (30) days after the commencement of negotiations to arrive at an agreement, the matter shall be determined by an Umpire designated by the American Arbitration Association, the decision of such Umpire to be final and binding on the parties.

(c) The percentage and annuity contributions hereinabove provided for constitute a consideration for the making of this Agreement and are of its very essence. Failure by any Employer to pay the amounts due from

him to the Trustees shall be deemed a breach of this Agreement, and in such event the Union may take such steps as it deems necessary to enforce the foregoing and following provisions relating to payment to the Trustees. In the event that an Employer fails to make the required payments for more than two (2) weeks the Union may order his Journeymen and Registered Apprentices to cease work until the payment has been made. Such Employer shall pay all such Journeymen and Registered Apprentices for all time lost, not to exceed one (1) week's wages per man.

(d) Any Employer required by this Article to pay the percentage contributions of the gross wages payable and the annuities to his Journeymen and Registered Apprentices or on their behalf for the payroll period immediately preceding, who fails to pay such percentage contributions within one week of the date prescribed for their payment shall pay to the Trustees as liquidated damages the sum of 10% of the required percentage contributions in addition to the required contributions. If any Employer during any calendar year has failed to pay such contributions with the prescribed date for more than a total of five (5) weeks and not more than ten (10) weeks, the penalty for such delinquency shall be twenty percent (20%) of the required percentage contributions. If the total is more than ten (10) weeks the penalty shall be thirty percent (30%). Any Employer who has been delinquent a total of more than ten (10) weeks is deemed to have been guilty of having violated the payment of wages clause and is subject to all penalties implicit in such violation.

Any Employer who fails to comply with the preceding paragarph shall be cited to appear before the Joint Board which may, on a finding, in its discretion, impose such penalties and/or liquidated damages as it deems appropriate, aside from and in addition to the liquidated damages provided for above.

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It is agreed that the Employers will be bound in all respects by the rules and/or regulations established or to be established by the Trustees relating to Employer contributions to the Trust Fund, including rules for resolving any disputes concerning Employer payments or reports to the Trustees.

Should any Employer, after an audit, be held subject to a final assessment on the estimated wage figure as the greater base on which his contribution is to be made, he shall be entitled on request to a hearing before the Trustees and an opportunity fully to present all available facts, and be subject to open examination thereon, which may establish his actual lower direct labor costs in the circumstances of his particular operations, which would warrant a readjustment of the base of his contributions from the estimated wage figure to his actual total gross earnings figure, as it may appear to the Trustees. If his rights to any such readjustment is proven satisfactorily, the Trustees shall remit the assessment of the excess contributions over the percentage contributions of his actual direct labor costs so found. The decision of the Trustees, after such hearing, shall be binding upon the Employer, unless within ten (10) days after receiving notice of such decision in writing the Employer shall appeal to the Joint Board. In the event of such appeal, the decision of the Joint Board shall be final and binding on all parties. If, after an audit, and a final assessment of further contributions due, the Employer fails, within ten (10) days after written notice thereof given by the Trustees, to request in writing a hearing before them as provided above to protest the assessment and to seek a readjustment of his base of contributions, the Employer shall be deemed conclusively to have consent thereto, with no further recourse.

As a condition to any appeal from a fine or from an audit report, the Employer shall post security in the sum of the

full amount of the fine or of the contributions determined by the audit report to be due.

All delinquencies in fund contributions, in Joint Board Fees, and in fines and assessments levied by the Joint Board must be paid up by any Employer before signing any agreement with the Union.